IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

OMAR ROSALES,	§	
	§	
Plaintiff	§	
	§	
v.	§	**CIVIL ACTION NO. 5:16-CV-1070 OLG**
	§	
CONCENTRA OPERATING CORPORATION,	§	
	§	
	§	
Defendant	§	

DEFENDANT'S REPLY TO PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION TO DISMISS

Plaintiff, an Austin lawyer suing a San Antonio urgent care clinic for alleged deficiencies in its web site, submitted a Response that largely is an effort to distract the Court from the basis for Defendant's Motion -- that the Court lacks subject matter jurisdiction because Plaintiff has not alleged facts demonstrating his standing to sue. Among other things, Plaintiff's Response misstates Defendant's arguments in order to set up "straw men" that he then attacks. Among other things, Plaintiff's Response: (1) discusses motions under Rule 12(b)(6) although Defendant has moved under only Rule 12(b)(1); (2) discusses matters relating to Medicare and Medicaid that are irrelevant to any issue presented by this case; (3) refers to state claims when none are mentioned in the Complaint; and (4) contains misstatements about purported concessions by Defendant.[1] All the while, the Response dodges the premise of Defendant's Motion—that Plaintiff has not pleaded facts establishing that he is a proper person to bring a challenge to Concentra's web site because he has

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1 For example, Defendant does not concede that Defendant's site violates the ADA or that Plaintiff has a disability that is in any way relevant to the claim in this case -- these are simply not issues presented by Defendant's Motion to Dismiss for lack of standing.

2 *Rohm & Hass Tex., Inc. v. Ortiz Bros. Insulation,* 32 F.3d 205, 208 (5th Cir. 1994); *FW/PBS, Inc. v. City of Dallas*,

suffered the necessary harm. To the contrary, his actions in bringing this suit establish he was able to access and use the web site.

Further, Plaintiff concludes his Response brief with the assertion that Defendant has not met its burden under 12(b)(1) even though binding authority establishes that it is Plaintiff's burden to establish standing, not Defendant's burden to disprove it.[2] Finally, Plaintiff's Response demonstrates a fundamental misunderstanding of the process by which law is made in the United States by contending that WCAG 2.0 should somehow play a role in deciding Defendant's Motion, while not disputing that WCAG 2.0 has never been enacted into law through the legislative process or promulgated as a binding regulation through administrative rule making.

The bottom line is that standing, and, thus, subject matter jurisdiction, does not exist because the Austin based plaintiff has not pleaded that he sought to use Defendant's urgent care services in San Antonio (or alleged specific and concrete plans to do so) and does not deny his ability to access and use Defendant's web site -- a fact demonstrated by his "screen grab" and this suit in which Plaintiff claims that Defendant's web site is somehow deficient for failing to accommodate a disability relevant to web site use that he does not allege.

I. AS WITH ANY CASE, A PLAINTIFF MUST HAVE STANDING TO SUE UNDER THE AMERICANS WITH DISABILITIES ACT.

Plaintiff seems to suggest that subject matter jurisdiction automatically exists merely because the suit is brought under a federal statute.[3] However, a plaintiff invoking a federal statute must establish his standing to bring the case because standing is always a component of subject matter jurisdiction. *Steel Co. v. Citizens for a Better Environment,* 523 U.S. 83, 93-102 (1998); *Cox v. City of Dallas, Tex.,* 256 F.3d 281, 303 (5th Cir. 2011). Federal subject matter jurisdiction is limited by Article III, Section 2 of the Constitution to "cases" and "controversies", which exist only if the Plaintiff is aggrieved or injured in fact. A plaintiff must establish standing before the merits can be addressed. *Id.* As a result, all of Plaintiff's erroneous assertions that Defendant's web site violates the ADA– are premature until standing is established by Plaintiff.

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[2] *Rohm & Hass Tex., Inc. v. Ortiz Bros. Insulation,* 32 F.3d 205, 208 (5th Cir. 1994); *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 231, 110 S. Ct. 596 (1990), *overruled on other grounds*. *City of Littleton v. Z.J. Gifts D-4, LLC*, 541 U.S. 774, 124 S. Ct. 2219, (2004).

[3] At page 7 of his Response, Plaintiff also states he is invoking supplemental jurisdiction for his state law claims. The problem for Plaintiff is that no state law claims are alleged in his Complaint. If there were state claims and the Court chose to dismiss the ADA claim, it could also decline supplemental jurisdiction, 28 U.S.C.§ 1367 (c)(3), as Magistrate Austin recommended in *Travis County Shoe Hospital* and *Paul Bo Yu* cases (previously cited in Defendant's Motion to Dismiss). In any event, standing requirements under Texas law and the ADA are the same. *Davis v. First Nat'l Bank of Trenton,* 2012 U.S. Dist. LEXIS 187133, 2012 WL 7801707, at *9 (E.D. Tex. 2012),

As noted in Defendant's Motion, to meet the "irreducible Constitutional minimum of standing," a plaintiff must prove three elements (1) an injury in fact -- which is an invasion of a legally protected interest that is "concrete" and "particularized" and "actual" or "imminent," not "conjectural" or "hypothetical"; (2) a causal connection between the injury and the conduct complained of; and (3) that it is "likely" as opposed to speculative that the injury could be redressed by an order from the Court. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992); *Deutsch v. Paul Bo Yu et. al.,* 2016 LEXIS 129334 (W.D. Tex. 2016). None of these requirements are satisfied in Plaintiff's Complaint.

First, the requirement of an injury in fact is not met. The only injury alleged in the Complaint is the claim that Plaintiff has a mobility limitation and unspecified hand impairments and that he experienced "discomfort" and "difficulty" in using Defendant's web site. This allegation is the very definition of an alleged injury that is not "concrete and "particularized" and "actual and imminent", but instead conclusory and speculative. Given that there is no injury in fact, it follows *a priori* that there is no injury caused by Defendant's conduct (in this case its web site).

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citing Texas Workers' Compensation Comm'n. v. Garcia, 893 S.W. 2d 505, 517-18 (Tex. 1995), and *DaimlerChrysler Corp. v. Inman,* 252 S.W. 3d 299, 304-05 (Tex. 2008). Thus, if Plaintiff had brought a claim for disability discrimination in public accommodations, it would be subject to dismissal for the same reason -- lack of standing -- as his ADA claim.

Overwhelming evidence of the complete absence of injury in fact exists in that Plaintiff was able to access the site, use it for a "screen grab" and analyze the site's features he claims violate WCAG 2.0. Plaintiff pleads no facts showing that he could not fully use Defendant's web site regardless of whatever disability he alleges -- though the disabilities he claims (mobility limitation and hand impairment) are manifestly unrelated to an ability to use the Concentra web site. There also is no allegation that the Plaintiff, an Austin lawyer, has been prevented or deterred from seeking urgent care services at a San Antonio medical clinic because of Defendant's web site.

The fact that an individual may have a mobility impairment does not confer standing upon him to challenge an internet web site that he is fully able to access and use. Simply put, in the same way a person with a hearing impairment -- but not a disability in walking or climbing stairs -- lacks standing to challenge the absence of a building access ramp because, in the words of the Fifth Circuit, it does not "actually affect his [day to day] activities in some concrete way,"[4] Plaintiff lacks standing to challenge alleged defects in Defendant's web site that he indisputably could access and use.[5]

II. WCAG 2.0 Does Not Have Force Of Law Or Establish A Legally Binding Standard For Web Accessibility.

Perhaps to distract the Court from his inability to raise a valid response to Defendant's Motion challenging his lack of standing, Plaintiff claims that Defendant concedes that the site violates the law. This is just not so—Defendant's disagreement with any claim that its web site is unlawful is stated in its Motion at p. 3 and footnote 1.

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[4] *Frame v. City of Arlington*, 657 F.3d 215 (5th Cir. 2011), *cert. denied,* 132 S. Ct. 1561 (2012).

[5] The claim in the Response that Defendant does not dispute Plaintiff's disability is also untrue. Defendant submitted a link to a news video of Plaintiff walking, in which Plaintiff does not appear in any way disabled in his mobility, which implicitly challenges the claim of disability. Further, it is not enough to establish standing to merely allege that one has some generalized disability that is entirely unrelated to accessing the alleged deficient site or location. Many Americans -- almost 60 million according to a 2010 U.S. Census Bureau report -- have some physical, mental or emotional condition that qualifies as a disability. Given this and the standing requirement of injury in fact, it is, thus, not enough for standing to merely allege some generalized or unspecific disability. To satisfy the standing requirement there need to be facts alleged that show specific injury, *i.e.*, how plaintiff's access is prevented or impaired as a result of a defendant's alleged deficient site and his claimed disability. In this case, Plaintiff has not alleged any specific disability that renders Defendant's web site inaccessible to him or makes him an appropriate individual to claim Defendant's site violates rights secured by the ADA.

Defendant did not devote a great part of its Motion arguing the lawfulness of its site because this merits based argument is not the issue in -- or in any way related to -- its Motion challenging Plaintiff's standing. In any event, the supposition of non-compliance with the ADA is inaccurate and demonstrates a basic misunderstanding by Plaintiff of how law is created in the United States. While Defendant does not wish to belabor the Court on a point not germane to the standing issue before it, WCAG 2.0 standards are mere guidelines published by a group of individuals and entities promoting a shared standard of web accessibility. WCAG 2.0 is neither a law nor a duly adopted governmental regulation. Because WCAG 2.0 standards are not the law, any alleged failure to satisfy them is not unlawful.

To correct any possible confusion created by Plaintiff's Response Brief, Defendant notes that the regulations referenced on page 11 of Plaintiff's Response are regulations concerning the ADA generally. The cited regulations do not mention WCAG 2.0, much less any of its recommendations, and certainly do not suggest Concentra's web site is non-compliant. (Moreover, on its face, it is hard to square one size fits all standards with the ADA's recognition that different entities may have different responsibilities for accommodation based on their available resources and that what may be reasonable accommodation for one entity may -- using ADA terms -- be an "undue burden" for another.)

The fact that the Justice Department has challenged web sites of totally different business entities is not particularly pertinent here. For example, the suit against EDX is easily distinguishable because the claim was against an online educational entity that presented course content and materials on its web site. This is not the case here, since Concentra's web site is primarily an electronic advertisement or marketing tool. (Unlike the disabled persons who could not access EDX's educational content, Plaintiff does not identify a single action he could not take using Defendant's web site due to his alleged disabilities.) Moreover, the fact that a settlement was reached in the EDX case or any other case involving different businesses and different web sites is irrelevant to whether Defendant's site violates the ADA. Certainly, the fact of a suit or a settlement does not establish either that WCAG 2.0 has force of law or that Concentra's web site is in any way non-compliant with the Americans with Disabilities Act.

The bottom line is that (1) WCAG 2.0 is not controlling law or authority; and (2) even under what the current Justice Department has said about the timetable for creating web site accessibility regulations (which presently are behind schedule), any regulations applicable to private businesses are at least two years away. Plaintiff does not cite a single case -- and Defendant has not found one -- in which an entity was held to have violated the ADA because it had not complied with the WCAG 2.0 recommendations. In short, the issue of whether or not Defendant's web site complies with the ADA is not before the Court. To be clear, if there was any genuine doubt, however, Defendant certainly does not concede or believe that its website violates the law.

III. THE FIFTH CIRCUIT'S DECISION IN *FRAME* CONFIRMS THE REQUIREMENT OF AN ACTUAL, IMMINENT, CONCRETE AND PARTICULARIZED INJURY -- AN INJURY IN FACT -- TO MEET THE STANDING REQUIREMENT.

Contrary to Plaintiff's Response, the Fifth Circuit's decision in *Frame v. City of Arlington*, 657 F.3d 215 (5^{th} Cir. 2011), does not dispense with or diminish the standing requirement for ADA cases. As noted by Magistrate Austin in his Recommendations in *Paul Bo Yu* and *Travis County Shoe Hospital*, the questions presented in *Frame* did not involve standing, but rather (1) the applicability of Title II to public sidewalks and (2) the commencement of the statute of limitations for a private citizen suit. Thus, *Frame* did not conclusively decide whether the "intent to return" theory for liability, which, as it sounds, requires a plaintiff to show an intent to return to an alleged, non-ADA compliant "facility" or the "deterrent effect" theory, which imposes the lesser burden that the plaintiff show he was deterred from attempting to use the facility because of improper barriers, is the correct standard for determining standing. However, as noted by Magistrate Austin, even if *Frame* is interpreted as expressing a preference for the more liberal test, in *Frame* the Fifth Circuit expressly confirmed that a plaintiff must nevertheless always establish facts sufficient to explain how the alleged deficiencies "negatively affect [his] day to day [life]" and also ruled that "mere allegations of non-compliant facilities" were insufficient to establish a violation of the ADA. *Frame*, 657 F.3d at 236. Indeed, the Fifth Circuit reiterated that the "established standing doctrine" is available to "weed out any hypothetical claims." *Id.* As stated by Magistrate Austin, "while *Frame* stands for the proposition that a plaintiff need not traverse a rocky road to prove that a missing sidewalk renders it inaccessible, he must nonetheless show that the inaccessible site somehow 'actually affects his activities in some concrete way.'" *Deutsch v. Paul Bo Yu* at p. 7 *quoting Frame*, 657 F.3d at 236.

The problem for Plaintiff is that he nowhere alleges facts satisfying the requirement in *Frame* that he plead (and ultimately prove) that his activities "were actually affect[ed]" in some concrete way by Defendant's web site. Most basically, there are no allegations in the Complaint explaining how Plaintiff's alleged disability prevented him from accessing and using Defendant's web site. The allegations that he experienced "difficulty" and "discomfort" are conclusory, hypothetical and vague -- the exact opposite of "concrete and particularized" and "actual" and "imminent." However, even if allegations of actual harm were made, they would have been, and are, completely undercut by the facts-- that Plaintiff indisputably accessed Concentra's web site. Indeed, he did far more than merely access it. He was able to work with it -- taking a "screen grab" which Plaintiff used to critique what he alleges are web site attributes that are non-compliant with WCAG 2.0.

Moreover, Plaintiff also fails to satisfy *Frame's* requirement of showing an actual effect on his day to day activities in some "concrete" way, because he fails to plead any facts that it was Defendant's web site -- as opposed to a lack of a genuine interest in obtaining urgent care services at Defendant's clinic in San Antonio -- that resulted in his non-use of Concentra's clinic. In short, this is not a case where a soon to be built facility or location (such as a sidewalk) is challenged because it would, "with a high degree of likelihood," deny a disabled person the benefits it provides. Here, Plaintiff has not alleged and cannot allege that Defendant's web site has adversely affected his day to day life in any way because, in truth, it has not.

In short, the problem for Plaintiff is that merely pleading that Defendant's web site made him "uncomfortable" does not come close to satisfying the requirement of an injury that is "actual and imminent" -- *i.e.*, that it affected his daily life in some concrete way. He did not, for example, plead that he was attempting to access Defendant's web site so that he could utilize Defendant's urgent care services in San Antonio and the web site prevented this, since, of course, neither would be true. Plaintiff was able to use the site and his pattern of threatening[6] and then suing entities, including a different medical practice in Boerne that refused to satisfy his monetary demand, demonstrates that Plaintiff was looking for a suit,[7] not for a San Antonio urgent care clinic to treat him approximately 80 miles from his city of residence. Given this, Plaintiff does not have standing and this Court lacks subject matter jurisdiction over Plaintiff's suit.

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[6] Plaintiff's demand to Concentra is attached as Exhibit 1.

[7] Defendant refers the Court to a recent sanction order against Mr. Rosales for his actions in suing Austin businesses that refused to meet his demand that his client in those cases be paid off not to sue Austin area establishments. *Deutsch v. Henry* 2016 U.S. Dist. LEXIS 168987 (Dec. 7, 2016, W.D. Tx.)

IV. Plaintiff's Supplemental Filing Is A Red Herring; It Fails To Respond To The Issue Of Standing Presented By Defendant's Rule 12(b) (1) Motion That Is Before The Court.

On Friday, December 16, Plaintiff filed a supplement to its Response, that attached a Statement of Interest filed by the Justice Department in a Florida case which expressed the Department's view that the ADA applies to the web site of a retail grocery chain. This submission by Plaintiff is another red herring that seeks to distract the Court from addressing the challenge to Plaintiff's standing and, thus, subject matter jurisdiction. Whether or not a web site is a place of public accommodation covered by the ADA (which remains an open question) is irrelevant to Defendant's Motion challenging Plaintiff's standing to bring this case because he has not suffered an injury in fact. While it may be that some web sites are places of public accommodation -- as in the case of colleges that present educational content online -- the issue of whether Concentra's site is a "place" of public accommodation is not before the Court in Defendant's Motion. Consideration of this issue would be premature since binding authority establishes that standing -- a component of subject matter jurisdiction -- must be adjudicated before the merits of the case are considered. *See* cases cited at p. 3 supra. In short, Plaintiff's December 16th filing is merely the latest distraction from the fact that Plaintiff, who has not been prevented from accessing Concentra's web site, lacks standing to challenge it.

Conclusion

For the reasons set forth in Defendant's Motion and this Reply, Plaintiff's suit should be dismissed for lack of subject matter jurisdiction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of December, 2016, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all counsel of record.

/s/ Robert A. Rapp
ROBERT A. RAPP